No. 21556

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE HERMAN and VICTOR HERMAN,

Appellants,

vs.

EAGLE STAR INSURANCE COMPANY, LTD., *et al.*,

Appellees.

APPELLANTS' OPENING BRIEF.

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Prefatory Statement.

Appellants Lee Herman and Victor Herman appeal from an adverse judgment in favor of respondent insurance companies following a trial on appellants' claim for payment for the loss of a $35,000.00 diamond ring under certain policies of insurance issued by the respondent companies. The District Court had jurisdiction on the basis of diversity of citizenship. It is the contention of the appellants that they were denied a fair trial by the trial court in that the trial court admitted, over appellants' objection, certain evidence of polygraph examinations which were conducted upon appellant Lee Herman. It is submitted that the admission of the polygraph evidence was in violation of appellant's constitutional rights to due process and a fair trial and constituted prejudicial error on the basis of which the judgment should be reversed and a new trial ordered.

Polygraph Evidence Is Inadmissible Under California Law.

In support of the admission of the evidence concerning the polygraph of Appellant Lee Herman, the Respondents cited to the Trial Court and relied upon the case of *People v. Houser* (1948), 85 Cal. App. 2d 686, 193 P. 2d 937. It is Appellants' contention that this case is unique in its factual situation and represents a grievous departure from the clear law in California concerning the admissibility of polygraph evidence. It is further submitted that to extend this case beyond its present scope would be a dangerous and unwarranted invasion of the constitutional rights of litigants.

At the risk of prolixity, it is felt that the leading cases concerning polygraph evidence should be reviewed so that this Court may be apprised of the language used by the California courts in demonstrating their attitude toward polygraph evidence in criminal and civil matters.

Polygraph Evidence in Criminal Cases.

People v. Houser (1948), 85 Cal. App. 2d 686, 193 P. 2d 937. This case involved the prosecution and conviction of the Defendant for lewd and lascivious conduct upon the body of an eight year old girl. Defendant appealed on several grounds, one of which was error in the admission of the results of a polygraph test. That portion of the opinion relating to the polygraph is as follows:

> "The next point involves the testimony pertaining to the lie detector test. It is claimed that such evidence has no evidentiary value and that such class of evidence is not regarded by the courts

and therefore it was improperly admitted. It appears from the *written stipulation signed by defendant and his counsel,* that the operator thereof, Mr. Riedel, is an expert operator and also an expert in interpreting results of such tests. It was likewise stipulated that such evidence, i.e., 'the questions propounded by said operator and the answers given by said defendant and the recordings of said defendant's reactions thereto and everything appertaining to said test and the entire results of said tests including the opinions of said operator be received in evidence on behalf of the people or on behalf of the defendant . . .' and that 'said defendant hereby waives his constitutional privilege against self-incrimination to the extent that the same may be involved in the presentation in evidence of the foregoing matters.' It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth when he denied to the officers that he took the girl to the orange orchard and committed the acts alleged upon her." (85 Cal. App. 2d 686 at 694, 695, Emphasis added).

Diligent research has failed to disclose any other case in California wherein evidence of a polygraph examination has been admitted. The *Houser* case is unique and is inconsistent with the clear line of California authorities which later established the rule against the admissibility of polygraph evidence. In ad-

dition, the *Houser* case is the only case which we have found where there was a "stipulation" signed by the party *and* his attorney and in which the stipulation provided all of the following:

1. That the operator was an expert and also an expert in interpreting the results of the test;
2. That the results of the test could be received in evidence on behalf of Plaintiff or Defendant;
3. That the Defendant waived his constitutional privilege against self-incrimination.

In its opinion, the court states that

> "It would be difficult to hold that the Defendant should *now* be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible." (Emphasis added.)

This language suggests that the Defendant's first objection to the admissibility of the evidence was made on the appeal and that there was no objection to the evidence at the time of trial, as there was in the instant case. This is the same interpretation that was placed on the *Houser* case when it was considered by the court two years later in *People v. Wochnick.*

People v. Wochnick (1950), 98 Cal. App. 2d 124, 219 P. 2d 70. This can be described as a leading case in California and was apparently the first case to consider the admissibility of lie detector evidence in the absence of a stipulation. This was an appeal from a murder conviction. The District Court of Appeal reversed the conviction on the ground that the results of a lie detector test performed on the Defendant were im-

properly placed before the jury in the guise of relating a conversation between the Defendant and a witness concerning the results of the test. In reversing, the court held that the admission into evidence of the results of the test constituted prejudicial error.

The language of the decision concerning the admissibility of polygraph evidence is as follows:

> "The question of the admissibility in evidence of the results of the polygraph or so-called lie detector test has not been decided in this State. In the case of *People vs. Houser,* 85 Cal.App.2d 868 [193 P.2d 937], such evidence was admitted pursuant to a *signed stipulation* and the court stated that the defendant could not *on appeal* assert that the results of the test were inadmissible in evidence. In other jurisdictions the courts, with but one exception (*People vs. Kenny,* 167 Misc. 51 [3 N.Y. 2d 348]. which was not appealed), have uniformly sustained the trial court's rulings in refusing to admit evidence of such examination. In *Frye vs. United States,* 293 F. 1013 [54 App. D.C. 46], *State vs. Bohner,* 210 Wis. 651 [246 N.W. 314; 86 A.L.R. 611], *People vs. Forte,* 279 N.Y. 204 [18 N.E. 2d 31, 119 A.L.R. 1198], and *People vs. Becker,* 300 Mich. 562 [2 N.W. 2d 503, 139 A.L.R. 1171], the defendants sought to introduce in their own behalf evidence of lie detector tests. The courts in these cases all held there was not sufficient scientific recognition of the efficacy of the machine to warrant the judicial acceptance of its recordings as evidence. In *State vs. Cole,* 354 Mo. 181 [188 S.W. 2d 541], a motion was made by defendant that the lie detector

machine be used in testing the truth of all witnesses. The court stated that while no doubt the lie detector is useful in the investigation of crime and may point to evidence which is competent, it has no place in a courtroom." (Emphasis added.)

"In *State vs. Lowry,* 173 Kan. 622 [185 P.2d 147], following a first trial, the court suggested to both the complaining witness and the defendant that they submit to a lie detector test before the second trial. The test was submitted to by both parties but there was no agreement that the results might be used as evidence. The outcome of the test was admitted at the second trial over the defendant's objection and on appeal the court stated (p. 151) [185 P.2d]: 'We are not ready to say that the lie detector has attained such scientific and psychological accuracy, nor its operators such sureness of interpretation of figures on a dial that the testimony here in question was competent, over objection, for submission to a jury holding the fate of the defendants in its hands . . . The conclusion here reached is in line with the almost unanimous holding of other courts and with the conclusions of law writers generally.' "

"We are in accord with the views expressed in the foregoing cases that 'the systolic blood pressure deception test for determining the truthfulness of testimony has not yet gained such standing and scientific recognition as justify the admission of expert testimony deduced from tests made under such theory.' " (98 Cal. App. 2d at pp. 127, 128).

Note in the court's reference to *People v. Houser,* the court distinguishes it as a case wherein there was

a *stipulation* and that the Defendant could not raise the objection to the admissibility of the polygraph evidence for the first time on appeal. This suggests that if the Defendant in *Houser* had objected to the evidence at the time of trial the result would have been different.

People v. Carter (1957), 48 Cal. 2d 737, 312 P. 2d 665. This was a conviction of murder in the first degree imposing the death penalty which was reversed by the California Supreme Court. One of the basis for the reversal was the trial court's error in failing to exclude a statement by a witness to the effect that he had been willing to take a lie detector test but "some other people wouldn't take [such a test] . . ." The court held that notwithstanding the fact that this testimony was stricken,

> "the implication survived that the Defendant had refused to take a lie detector test and that his refusal furnished some evidence of guilty knowledge. *Lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results* (citations)." (Emphasis added.)

This appears to be the first California Supreme Court case to pass on the question of reliability of lie detector tests and their admissibility in evidence and can be considered the leading case. Numerous cases have followed the *Carter* case with regard to the general rule stated by the court that lie detector tests are inadmissible because they are unreliable and also the general rule that the agreement or the refusal to take a lie detector test is likewise inadmissible because the results of the test would have been admissible and therefore no inference can be raised from the agreement or

refusal to take the test. It is worthy of note that the California Supreme Court considered polygraph evidence so scientifically unsound that even an oblique reference to the test, such as in the *Carter* case was prejudicial and reversible error.

People v. Aragon (1957), 154 Cal. App. 2d 646, 316 P. 2d 370. This was a prosecution for bribery in connection with a boxing event. The District Attorney, in his opening statement and during his examination of witnesses, attempted to introduce the results of a lie detector examination previously given to the Defendant. The Defendant had voluntarily taken the test at the request of the Texas Boxing Commission before any criminal prosecution had begun. The Prosecutor did not offer the test itself but merely offered conversations concerning the test between the witness and the Defendant. The court in reversing the conviction held that

> "the statements with reference to the lie detector test as introduced in this case were highly prejudicial and in our opinion constituted prejudicial error." (154 Cal. App. 2d at p. 659).

In considering the admissibility of lie detector evidence the court stated as follows:

> "In the instant case there is nothing before us to establish what kind of lie detector test was given, if any; there is nothing concerning the accuracy of such a test; there is no showing that the tests, even if properly given, have achieved scientific recognition in this State; there is no foundation for the admission of any test results; and there is no *stipulation* that the testimony could be received in evidence. It is not at all unlikely that a popular

> belief has been formed from press, radio, television, stage and screen that the lie detector is an accomplishment of modern science, the results of which are as reliable as those of fingerprinting, blood tests and ballistics. However, this is not correct. It is general knowledge among those familiar with the lie detector machines that the results are greatly dependent upon the training, experience and skill of the operators and that the results vary with different types of subjects. . . .
>
> "It may well be that the lie detector is of use in the field of criminal investigations and for some other purposes, but we know of no appellate decisions sustaining its use in the trial of a criminal case in the absence of a *stipulation.*" (Emphasis added).

The court cited the *Wochnick* and the *Carter* case as authority for its decision.

People v. Jones (1959), 52 Cal. 2d 636, 343 P. 2d 577. This case was an appeal from a death penalty murder conviction. One of the errors assigned by the Defendant was that the court refused to admit into evidence the results of a test conducted upon Defendant under sodium pentothal (truth serum). The court affirmed the conviction and with regard to this specific assignment of error, the court held that there was no error for two reasons. First, that there was no proper offer of proof made to the court concerning the evidence proposed to be introduced about the truth serum test, and, more important,

> "the result of such a test is not admissible in a criminal case. The courts have consistently held that whether the test is a *polygraph test,* or a sodium

> amytal or sodium pentothal test, the results are not such as to be admissible for or against the Defendant because of a lack of scientific certainty about the results. (Numerous citations) These tests do not scientifically prove the truth or falsity of the answers given during such tests." (52 Cal.2d at p. 653, Emphasis added.)

People v. York (1959), 174 Cal. App. 2d 305, 344 P. 2d 811. This is an appeal from conviction of murder in the first degree. One of the assignments of error was the refusal of the court to permit the Defendant to qualify a polygraph expert who would testify relative to the results of a polygraph examination taken by the Defendant.

In affirming the conviction, the Appellate Court cited with approval the *Carter* case which held "lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results", and the *Jones* case which held

> "the courts have consistently held that whether the test is a polygraph test or a sodium amytal test or a sodium pentothal test, the results are not such as to be admissible for or against the Defendants because of a lack of scientific certainty about the results."

This decision was in the Fourth Appellate District which is the same one that decided the *Houser* case.

Polygraph Evidence in Civil Cases.

The question of the admissibility of polygraph evidence in a civil case has been rare in the State of California. The first, and apparently the only, case in which it has been directly considered is *Gideon v. Gid-*

eon (1957), 153 Cal. App. 2d 541, 314 P. 2d 1011. This was a divorce action wherein the Defendant husband appealed from a judgment for the wife and in connection therewith Defendant asserted that the court should have considered lie detector evidence offered by him to show that the Defendant was telling the truth regarding his charges of fraud in proceedings. The court stated

> "these statements were conclusions only, prove nothing, and, as will later appear in this opinion, *the lie detector tests are worthless.*" (153 Cal. App. 2d at p. 545, Emphasis added.)

With reference to the polygraph evidence, the court said:

> "Finally with reference to Mr. Gideon's contention that lie detector tests support his statement that there was fraud and perjury. In his arguments to this court, he says that there was fraud and perjury and in his affidavit he avers that there was. Then he argues that when he submitted the statements and averments to a lie detector expert, the expert said that they were true.
>
> "This is, of course, unstable and illogical reasoning. Lie detector tests have no place in California law. In *People vs. Carter* (citation) our Supreme Court says: 'Lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results.'
>
> "In the opinion of this court, use of lie detectors would add a dangerous refinement to our trial practice. For then each witness in a case could go to a lie detector expert and repeat his testimony. Then the expert could testify that that wit-

> ness' testimony was true when tested by the lie detector and then the Judge or the jury charged with finding the truth could be confounded by as many lie detector opinions as to whether or not witnesses who gave conflicting testimony told the truth as there were conflicts.
>
> "One of the primary functions of our trial courts, to find and declare the truth, would then be like flotsam caught in a whirling eddy, go round and round and get nowhere." (153 Cal. App. 2d at pp. 546-547).

McCain v. Sheridan (1958), 160 Cal. App. 2d 174, 324 P. 2d 923. This was a petition for reinstatement by a police officer who had been dismissed from the force for his refusal to take a lie detector test. There had been a shortage in the cash bail fund and 17 employees of the police department had control of this fund. By a petition to the police chief, all 17 of these employees stated that they were subject to adverse publicity and that they were suspected of appropriating the missing funds and all of them urged "that a full scale investigation, including the use of latest scientific aids, be employed at once in an earnest effort to establish the innocence or guilt, of each of the undersigned." The petitioner was one of the signers of this document and when he presented the petition to one of his fellow officers, he stated that the petition was a request that the signers be given a lie detector test. Upon receipt of the petition, the police chief arranged with an expert for the giving of a lie detector test. Later the petitioner took the lie detector test and when he was advised that it showed that he had been false in his statements, the petitioner asked to leave and re-

fused to submit to any further testing. Later the police chief ordered him to complete the poligraph test and offered to arrange the test by another examiner. This, the petitioner refused and he was dismissed for failing to comply with this last order of the chief of police.

The question on the appeal was whether the petitioner's refusal to comply with the chief's order to complete the polygraph test constituted insubordination and disobedience. The Appellant argued that the order to take the test was unreasonable and invalid because the results of the test could not be admissible in evidence for or against the Appellant. In this connection, the Appeal Court said:

> "Beyond question, the results of lie detector tests are inadmissible in evidence on the trial of a criminal case, whether offered by the prosecution (citations) or the defense (citations). *Nor are such results admissible on trial of a civil case.* (citing *Gideon vs. Gideon*). Similarly, a suspects' willingness or unwillingness to take such a test is inadmissible at trial (citing *People vs. Carter*)." (160 Cal. App. 2d 174, 177, Emphasis added.)

The court affirmed the judgment holding:

> "By his written request that the test be administered to him, Appellant evinced desire to obtain whatever benefits such apparent willingness might yield in diverting the investigation to others. The order that he complete the test he had himself requested, seems in no way an unreasonable departmental regulation. Such tests are recognized as having some value in investigation, even though they are not yet sufficiently reliable to be admitted into evidence." (*Ibid*)

Although the admissibility of polygraph evidence was not directly in issue, the above quoted language strongly suggests the court's opinion that, notwithstanding the fact that the petitioner had agreed to take the test and in fact invited it, the test was still inadmissible in evidence in a civil action.

Frazee v. Civil Service Board (1959), 170 Cal. App. 2d 333, 338 P. 2d 943. This case is similar to the *McCain* case in that it is a petition to compel the reinstatement of a police officer who was discharged for refusing to take a lie detector examination.

The Appellant police officer contended that inasmuch as the results of polygraph tests are inadmissible in evidence, to submit to one would be an idle act and therefore the chief acted arbitrarily and unreasonably in requiring him to take such a test.

The court reaffirmed the holding of *People v. Carter* to the effect that "lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results". However, the court followed the *McCain* case and held that even though the tests are inadmissible, a police officer because of his position of trust and confidence in the community should not decline to take such a test when it is requested and therefore his discharge was proper.

Fichera v. State Personnel Board (1963), 217 Cal. App. 2d 613, 32 Cal. Rptr. 159. This was an appeal from a refusal to reinstate a California State police officer who was discharged for refusing to take a polygraph test. The court relied on the *McCain* and *Frazee* cases for the proposition that police officers are in a unique position and therefore should not re-

fuse to have their polygraphs taken. The court in commenting on the *McCain* case referred to the fact that the officer in that case had at first asked for the test and later refused to obey an order to take it but the *Fichera* court indicated that there was no element of estoppel in the *McCain* case. In other words, the Appellant's agreement to take the test did not estop him from claiming it was still inadmissible in evidence and the court acknowledged that it was still inadmissible. There is no mention of the *Houser* case in the decision in the *McCain* case or in the decision in *Fichera* to the effect that McCain's agreement to take the polygraph would have made it admissible and for that reason his refusal to take the test was unjustified.

In the *Fichera* case the Appellants argued that the *McCain* and *Frazee* cases should be abandoned because they constitute a dangerous intrusion on the privacy of individuals by forcing the taking of polygraph tests and that the tests are unreliable. With regard to the question of reliability, the court stated as follows:

> "It may be conceded that there is a considerable degree of fallibility with the polygraph (citation). It is not considered to have enough reliability to justify the admission of expert testimony in the courts based on its results and a person's willingness or unwillingness to take the test is without enough probative value to justify its admission. (citing People vs. Carter)" (217 Cal. App. 2d 613, 622).

The court goes on to state that as an investigative tool, it may have some value and the justification, in this case as in *McCain* and *Frazee,* is that the Appel-

lants were not entitled to withhold this means of investigation and at the same time retain their positions as officers of the California State Police.

Cases From Other Jurisdictions.

There is a dearth of authorities relating to polygraph evidence in other jurisdictions. These have been collated in 23 A.L.R. 2d, 1306-1311 and the supplements thereto. These cases are summarized below:

State v. Lowry (1947), 163 Kan. 622, 185 P. 2d 147. In the *Lowry* case it was held that the admission of the results of a lie detector test over Defendant's objection was error even though the test had been suggested by the trial court and *agreed to by both the prosecuting witness and the defendant,* the court reasoning:

> "There is no persuasive analogy here with such tests as fingerprinting which have a strictly physical basis, clearly demonstrable. It is not contended that the lie detector measures or weighs the important psychological factors. Many innocent but highly sensitive persons would undoubtedly show unfavorable physical reactions, while many guilty persons, of hardened or less sensitive spirits would register no physical indication of falsification. This the trained operators of course understand and proceed upon the basis of a large percentage of error. But it seems quite too subtle a task of evaluation to impose upon a untrained jury." (This case was cited by the Court in *People vs. Wochnick, supra.*)

Stone v. Earp (1951), 331 Mich. 606, 50 N.W. 2d 172. The Michigan Supreme Court ruled that lie detector evidence was inadmissible in a *civil action* by

reason of the fact that the tests were still in the experimental stage. The Court held that neither *consent of the parties* to take the tests nor the trial court's direction that the parties submit to the tests, served to render the evidence competent.

State v. Tremble (1961), 68 N.M. 406, 362 P. 2d 788. The court held that evidence of a lie detector test was inadmissible over the Defendant's objection in this prosecution for incest even though the Defendant had signed a waiver *agreeing* to take the test and be bound by the results thereof.

LeFevere v. The State (1943), 242 Wis. 416, 8 N.W. 2d 288. The Defendant in a murder prosecution voluntarily submitted to a series of lie detector tests under a *stipulation* with the District Attorney which provided that the results of the test might be admitted in any trial or proceeding. At the trial the findings of the lie detector operators which were favorable to the defendant were excluded on objection by the State and the Supreme Court of Wisconsin held that the exclusion was proper, notwithstanding the stipulation.

People v. Zazzetta (1963), 27 Ill. 2d 302, 189 N.E. 2d 260. The court held that the results of a lie detector test, although taken pursuant to Defendant's *stipulation* permitting admission of such results in evidence, was inadmissible where the stipulation was made orally by the Defendant, a man with an eighth grade education, appearing before the court prior to trial without counsel, and on trial no evidence was introduced regarding the method of testing or the qualification of the operator and the expert was not available for cross-examination.

State v. Valdez (1962), 91 Ariz. 274, 371 P. 2d 894. The court held that polygraphs and expert testimony relating thereto are, subject to certain qualifications, admissible upon *stipulation* in criminal cases, to corroborate other evidence of Defendant's participation in the crime charged or to corroborate or impeach his own testimony if he takes the stand.

In the cases of *State v. Lowry, Stone v. Earp* and *State v. Tremble,* the parties had agreed to take the test but there was no specific stipulation for it to be admitted into evidence, although in the *Tremble* case the Defendant had agreed to be bound by the results. In all of these cases the evidence was excluded. In the cases of *LeFevere v. The State* and *People v. Zazzetta,* there were express stipulations permitting the results to go into evidence and the court excluded the polygraph evidence upon objection at the time of the trial. In the case of *State v. Valdez,* the court held that the polygraph evidence would be admissible upon *stipulation* but only for the limited purposes set forth therein.

Summary.

Although numerous cases have dealt with polygraph evidence in the nearly twenty years since the *Houser* case, diligent research has failed to disclose a single case in California or otherwise that has followed the *Houser* case. It is submitted that the facts of that case were unique with regard to the stipulation signed by both the Defendant *and his attorney* and also the aggravated nature of the crime against the child of tender years. It would be unwarranted and dangerous to extend the questionable "rule" of the *Houser* case into other cases where the facts do not clearly and

unequivocally bring themselves within the scope of the *Houser* decision. Namely, a stipulation by the party, signed by his attorney for the taking of the polygraph test, the acknowledgement of the expertice of the operator, the express agreement for admission of the test in evidence and the waiver of the constitutional privilege which would otherwise be violated by the admission of this evidence. In the absence of such stipulation, the protection of a party's constitutional guarantees to a fair trial would be as fragile as the individual party's resistence to his opponent's suggestion that the test be taken. Without the advice of competent counsel concerning the rights which the party would be waiving, the courts should not and have not permitted polygraph evidence to be admitted—and the only way the attorney's advice and consent can properly be demonstrated is by his signature on a stipulation or in open court in the manner prescribed by law. Where such a basic rule of evidence is being waived, the courts should zealously protect the uninformed and naive litigant.

Polygraph Agreements [Exhibits C and D] Are Not Binding Upon Appellants nor Valid to Permit the Admission of the Polygraph Evidence.

The Polygraph Agreements Were Signed by Appellants Without the Advice of Counsel.

At the trial of the instant case evidence of the polygraph examination of appellant Lee Herman was introduced by respondents over appellants' objection. This objection was overruled by the trial court

> "on the grounds that there is a *stipulation* that allows this into evidence. I am allowing it pursuant to that *stipulation*.

"I understand the rule of law if there is no stipulation, but under the stipulation I am allowing it over the objection.

Objection overruled." [Rep. Tr. p. 331, lines 9-15 (emphasis added)]

Prior to the objection raised to the specific evidence on the polygraph there had been a general objection lodged to the line of questioning concerning any polygraph evidence and this was the subject of a lengthy discussion between the court and counsel out of the hearing of the jury [Rep. Tr. pp. 235-277]. This conference with the court was for the purpose of evaluating the validity, in the court's mind, of the polygraph agreements [Exs. "C" and "D"]. During the course of these discussions there were unsworn representations made by respondents' counsel, Mr. James White, concerning the circumstances under which the polygraph agreements were executed by the appellants. The appellants represented to the court that the polygraph agreements were both signed on November 11, 1964, at the request of Mr. White who was then acting as attorney for the respondents. This was at a time prior to the filing of the instant action and prior to the time when the appellants were represented by counsel. Respondents contended through their counsel that the polygraph agreement relating to Lee Herman [Ex. "C"] was executed by Lee Herman on April 22, 1965, at a time when she was then represented by counsel and that Exhibit C was executed in the presence of attorney Arnold Shane, an associate of attorney Charles J. Katz, who was then the appellants' attorney of record. In considering whether there had been a validly executed stipulation for the admission of the polygraph

evidence, the trial court was presented with the sworn testimony of Lee Herman to the effect that the polygraph agreement [Ex. "C"] was executed by her on November 11, 1964, and that on April 22, 1965 she did not sign anything [Rep. Tr. p. 271, line 10, to p. 274, line 6]. In addition the court was presented with the sworn affidavit of attorney Arnold Shane [Clk. Tr. pp. 58-59] in which he states that at the time that he appeared at the Herman's residence on April 22, 1965, Mr. White, the attorney for respondents, produced from his brief case the polygraph agreement [Ex. "C"] already signed by Lee Herman.

By way of rebuttal to this sworn testimony of Lee Herman and Arnold Shane, respondents offered only the sworn testimony of the polygraph examiner, Kenneth W. Scarce [Rep. Tr. p. 259, line 19, to p. 268, line 23]. During the course of this testimony, the court asked Mr. Scarce if he knew when Mrs. Herman had signed the Exhibit "C" and Mr. Scarce indicated that he did not know [Rep. Tr. p. 268, lines 17-23]. It is submitted, that on the state of the record of sworn testimony before the trial court, both by oral testimony and affidavit, there was no evidence in the record that would permit a finding by the trial court that the polygraph agreement [Ex. "C"] was signed by Mrs. Herman on April 22, 1965, but the only evidence that was in the record indicated that it was signed by her on November 11, 1964.

In his argument in support of the admissibility of the polygraph evidence, respondents' counsel asserted that at the time the polygraph examination was given to Mrs. Herman on April 22, 1965, counsel for the respondent insurance companies requested attorney Ar-

nold Shane to sign the polygraph agreement but Mr. Shane refused to do so [Rep. Tr. p. 235a, lines 2-7]. It is submitted that even if respondents' version of the signing of the polygraph agreement [Ex. "C"] is true and the agreement was signed by appellant Lee Herman on April 22, 1965, which fact appellants strenuously deny, then the fact that respondent's counsel asked Mr. Shane to sign the agreement acknowledges respondents' appreciation of the fact that the polygraph evidence should not be admitted without a stipulation by the opposing parties' attorney. There is no question that an attorney who has knowledge of a party being represented by another attorney cannot deal with that party directly but must deal with her counsel. For this reason an agreement extracted from Mrs. Herman without the consent of her counsel would be improper and would not be binding on Mrs. Herman. At the time respondents' counsel requested Mr. Shane to sign the stipulation or agreement regarding the polygraph, respondents' counsel indicated that Mr. Shane refused to do so because he was new in the case. At that point it was incumbent upon respondents' counsel to refrain from further proceeding or attempting to have Mrs. Herman sign the agreement but rather to obtain the signature of Mrs. Herman's attorney of record, Charles J. Katz. The reason respondents' counsel never sought or obtained Mr. Katz' agreement to admit the polygraph evidence is because he knew that no competent attorney would have given him such a stipulation.

Further evidence that the Herman's attorneys had never agreed to the admission of the polygraph evidence is the fact that appellants' objection to the ad-

missibility of that evidence was expressly preserved in the pre-trial order [Clk. Tr. p. 31, lines 4-14]. If appellants had agreed or stipulated to the admission of this evidence, they would not have reserved this objection nor would respondents have permitted such a reservation.

There Was No Valid Stipulation to Admit the Polygraph Evidence.

As indicated above, appellants assert that there is no evidence in the record that would support the finding by the trial court that the polygraph agreement [Ex. "C"] was signed by Lee Herman on April 22, 1965, as opposed to November 11, 1964. However, even if the trial court were justified in assuming that Exhibit "C" was signed on April 22, 1965, the signature at that time by appellant Lee Herman would have no binding effect upon her in the law suit that was then proceeding. Mr. Shane's presence at the time of such signing or his notations on Exhibit C would not bind the appellants.

> "An attorney and counsellor shall have authority:
> 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court and not otherwise. . . ."
>
> *Code of Civil Procedure,* Section 283.

A stipulation which does not appear to have been filed or entered in the minutes of the court below, as required by the Code of Civil Procedure, Section 283, cannot be recognized by the Appellate Court.

> *Hoopes v. Superior Court* (1925), 71 Cal. App. 564, 235 Pac. 739.

In the absence of such a stipulation by Mrs. Herman's attorney of Record, the agreement or stipulation concerning the polygraphs which was obtained, according to the respondents, *after* the commencement of the action, would be invalid and not binding upon appellant Lee Herman.

Where a Party Is Represented by an Attorney of Record, the Party Cannot Enter Into a Stipulation Affecting the Conduct of the Action.

It is settled that the attorney of record has the exclusive right to appear in court for his client and to control the court proceedings, so that neither the party himself nor another attorney can be recognized by the court in the conduct or disposition of the case. (*Wells Fargo & Co. v. City of San Francisco* (1944), 25 Cal. 2d 37, 42-43, 152 P. 2d 625.)

It is the settled law of this State that while a party to an action may appear in his own proper person or by an attorney, he cannot do both, and that as long as he has an attorney of record in an action, the court cannot recognize any other as having management or control of the action, *and the party can act only through his attorney.* (Emphasis added). (*Boca and Loyalton Railroad v. Superior Court* (1907), 150 Cal. 153 at 155-156, 88 Pac. 718.)

> "While there is an attorney of record, no *stipulation* as to the conduct or disposal of the action should be entertained by the court unless the same is *signed or assented to by such attorney.* Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary." (*Boca and Loyalton Railroad v. Superior Court* (1907), 150 Cal. 153 at 155-156, 88 Pac. 718.)

If a party has an attorney of record, a stipulation relating to the conduct or disposal of an action is *ineffectual* unless signed or assented to *by the attorney* (46 Cal. Jur. 2d, Stipulations, Section 3, page 8 and cases cited).

The attorney of record has the exclusive right to appear in court for his client and neither the party himself nor another attorney should be recognized by the court in the conduct or the disposition of the case (*Epley v. Califro* (1958), 49 Cal. 2d 849, 854, 323 P. 2d 91).

In the instant case the trial court characterized Exhibit "C" as a "stipulation" and said stipulation was the basis for the court's overruling appellant's objection to the admission of any polygraph evidence [Rep. Tr. p. 331, lines 9-15]. It is submitted that there is no basis in the present record for the court's finding that there was a stipulation. Such a finding constitutes an abuse of discretion by the trial court in that there is no evidence of a stipulation in the record. There is no question that at the time the polygraph examination was given on April 22, 1965, the instant law suit had been filed and appellants were represented by attorney Charles J. Katz, their attorney of record. This is acknowledged by respondents' counsel in his statements to the court [Rep. Tr. p. 235, lines 13-18]. A review of Exhibit "C", the polygraph agreement signed by Lee Herman, demonstrates that it was never signed by attorney Charles J. Katz, the attorney of record for the appellants. Therefore, under the foregoing authorities,

Exhibit "C" cannot constitute a stipulation even if it were signed by Lee Herman on April 22, 1965, as urged by respondents. Under the foregoing authorities the trial court was obligated to disregard such a "stipulation" signed by the party when the stipulation had not been signed or assented to by the attorney of record. The record indicates that the attorney of record for appellants was not even in attendance at the time the polygraph examination on April 22, 1965, but instead an associate of the attorney of record, Arnold Shane, was in attendance, and when requested by respondents' counsel, he refused to sign the stipulation [Rep. Tr. p. 235a, lines 2-7].

Contrary to he unsworn statements of respondents' attorney to trial court, it is most illogical that attorney Shane would have refused to have signed the polygraph agreement and yet permit Mrs. Herman so to do. More logical is Mrs. Herman's and attorney Shane's sworn statement to the trial court that Exhibit "C" was signed by Mrs. Herman prior to April 22, 1965, namely on November 11, 1964, when respondents' attorneys secured the agreement from them at their home, at a time when they were not represented by counsel.

There Was No Proper Foundation for the Admissibility of the Polygraph Evidence.

As noted above, the trial court admitted the polygraph evidence on the basis of what the court found to be a "stipulation" by appellant Lee Herman. Appellants are not asking this Court to "weigh" evidence

before the trial court concerning the so-called stipulation. It is submitted that there was *no evidence* in the record to sustain such a finding. The only evidence of the so-called stipulation was Exhibit "C" itself, which was not signed by the attorney of record for appellant Lee Herman, the sworn testimony of Lee Herman and the sworn affidavit of Arnold Shane, both of which assert that the so-called stipulation was not signed on April 22, 1965, but it was in fact signed prior to that date and at a time when appellants were not represented by counsel. The only language in the record before the trial court that contradicts this is the unsworn statement of respondents' counsel and it is axiomatic that statements of counsel are not evidence.

Accordingly, it is submitted that there is no evidence in the record upon which the court could have based a finding of fact that there was a stipulation signed by appellant Lee Herman and her attorney of record which would be binding upon appellant at the time of trial nor was there any evidence in the record to justify a finding on the part of the trial court that Exhibit "C" was signed after the commencement of the action.

If Exhibit "C" was signed before the Commencement of the action then it is clearly not a stipulation. If Exhibit "C" was signed after the commencement of the action but without the assent of appellants' attorney of record, then under the cases cited it is not a binding stipulation. In either case the Exhibit "C" cannot result in the admissibility of the polygraph evidence under the so-called "rule" of the *Houser* case and such evidence should have been excluded by the trial court.

Conclusion.

Based on the foregoing Points and Authorities, it is submitted that polygraph evidence is so disfavored by the California courts, as well as the courts of other jurisdictions, that in order to permit its introduction in evidence, there must be clear and unequivocal evidence of a valid stipulation. Appellants contend that the *Houser* case is "bad law" and that at the very best should be restricted to the narrow confines of its decision. Appellants consider it to be a dangerous case from a Constitutional and fair trial point of view and urge that there was no evidence presented to the Trial Court that would justify the application of the *Houser* decision to the instant case.

The circumstances surrounding the execution of the polygraph agreement Exhibits C and D are so equivocal and so suspicious that it was error for the court to permit the introduction of the polygraph evidence. There is no question that before the instant lawsuit was filed and before the Appellants were represented by counsel, the Respondent insurance companies sent out their attorney to secure this agreement from the Appellants by which they waived an important right, without which they could not hope to obtain a fair trial. By this technique the insurance company Respondents improperly obtained the consent of the Appellants to be bound by the results of a questionable test, conducted by a person who was not stipulated by the parties to have been qualified and who was to be the sole judge as to the interpretation of the test, which test was given under circumstances which the insurance companies' own witness admits were sub-standard [Rep. Tr. p. 381, line 22, to p. 383, line 14].

It is submitted that the insurance companies set appellants up in an artful and rather devious trap. Because of their good faith and their willingness to cooperate, the Appellants were placed in a position where the Respondent insurance companies could annihilate their legitimate claim by having the Appellants bound to accept the testimony of the insurance companies' man, conducting the insurance companies' test, under the insurance companies' circumstances and for the insurance companies' benefit. This is not consistent with our idea of a "fair trial". It stretches credibility to the breaking point to think that in connection with the defense of a $35,000.00 claim, where there was no evidence of any impropriety in the claim except the polygraph examination, that the insurance companies would treat the Appellants with candor and fairness. The Respondents in this case have unfairly and improperly gained an advantage over the Appellants, the result of which has saved the insurance companies from paying a $35,000.00 claim as to which there was no legitimate defense. The defense of this case was conducted by insult and innuendo and there was no credible evidence that would justify the defense verdict.

It is submitted that the Court should Reverse the Judgment and grant the Appellants a new trial.

Respectfully submitted,

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By ARTHUR SOLL,
Attorneys for Plaintiffs, Lee Herman and Victor Herman.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR SOLL